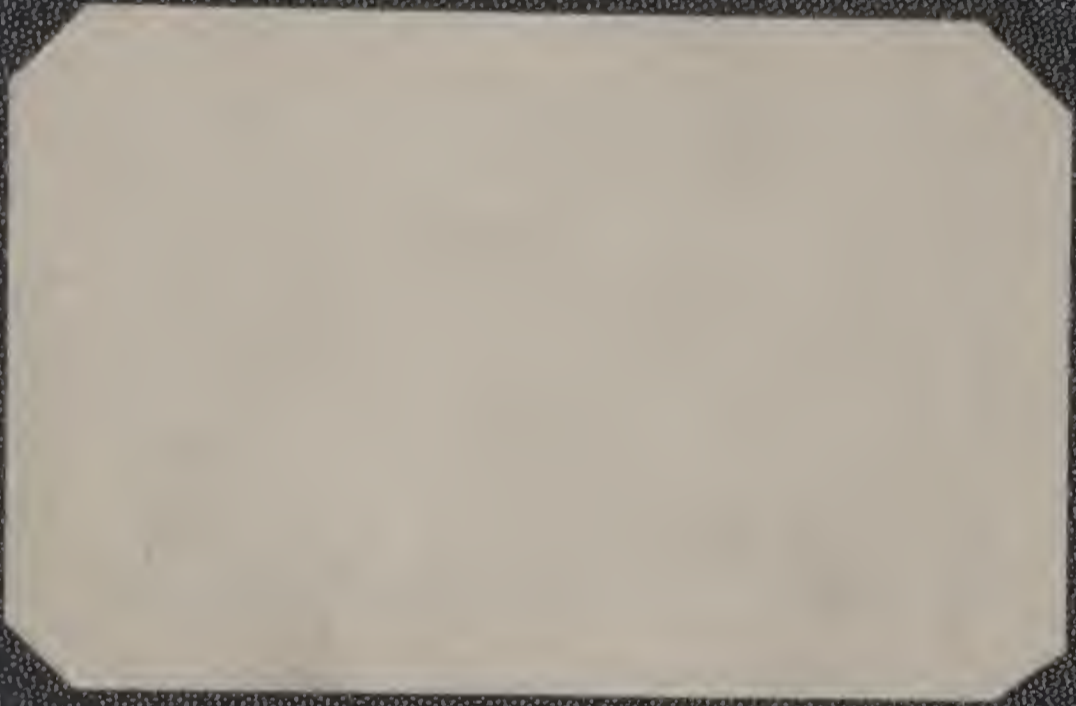


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SPEECH

OF

HON. GEORGE H. PENDLETON, OF OHIO,

IN THE HOUSE OF REPRESENTATIVES, DECEMBER 10, 1861.

The Judiciary Committee reported back the memorial of Charles Howard, William H. Gatchell, and John W. Davis, police commissioners of the city of Baltimore, and recommended that the committee be discharged from its further consideration.

Mr. PENDLETON. Mr. Speaker, as a member of the Judiciary Committee, I felt myself obliged to examine very carefully the questions which arise on that memorial. I have formed a very decided opinion as to all of them, and as to the proper course to be pursued by this House in regard to them. It is a subject involving the personal liberties of the citizen and their constitutional guarantees. There is, therefore, since I disagree entirely to the report of the committee, no choice left to me in the performance of what I understand to be my duty as a Representative and as a member of that committee, but to make every effort in my power to induce the House to give what I think is a proper response to a respectful petition.

I move to recommit this report to the Committee on the Judiciary with instructions to report a resolution which I send to the Chair, and on which I shall ask the attention of the House for a few moments.

The resolution was read by the Clerk, as follows:

Resolved, That the Congress alone has the power, under the Constitution of the United States, to suspend the privilege of the writ of *habeas corpus*; that the exercise of that power by any other department of the Government is a usurpation, and therefore dangerous to the liberties of the people; that it is the duty of the President to deliver Charles Howard, William H. Gatchell, and John W. Davis to the custody of the marshal of the proper district, if they are charged with any offense against the laws of the United States, to the end that they may be indicted, and "enjoy the right of a speedy and public trial by an impartial jury of the State and district wherein the crime" is alleged to have been committed.

[Having stated in detail the circumstances of their arrest, July 1, 1861, by United States troops, under orders of General Banks, their confinement in Fort McHenry, that the President had refused to inform the House of the grounds of the arrest, and on the same day had removed them to Fort Lafayette, that a grand jury in the circuit court for Maryland had been in session and found no indictment, that the process of the court had never been resisted, except by order of the President, Mr. PENDLETON proceeded.]

The Constitution of the United States provides that

"The right of the people to be secure in their persons, houses, papers, and effects against unreasonable searches

and seizures shall not be violated; and no warrant shall issue but upon probable cause, supported by oath or affirmation."—Article 4, Amendments.

"No person shall be held to answer for a capital or otherwise infamous crime unless on a presentment or indictment of a grand jury," * * * "nor be deprived of life, liberty, or property without due process of law."—Article 5, Amendments.

"In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial by an impartial jury of the State or district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense."—Article 6, Amendments.

These memorialists have been seized without "a warrant;" they are held without "an indictment;" they are deprived of their "liberty without due process of law;" they are denied "a speedy trial;" they are not informed of the "nature and cause of the accusation;" they are not "confronted with the witnesses" against them. They appeal to Congress to secure to them the benefit of these constitutional provisions; they ask "that their case may be investigated by Congress or be remitted to the judicial tribunals to be legally heard and determined;" and my worthy colleagues on the Judiciary Committee can find no more appropriate answer to their prayer than that it shall lie unanswered on your table.

What do they ask? Of what do they complain? They ask that they may have "a speedy trial;" that they may be acquitted or condemned. They complain that they are arbitrarily held by the military power, and denied an opportunity to answer any charge which may be brought against them. They do not ask an acquittal; they do not sue for pardon; they ask no relaxation of the strictness of the law. On the contrary, they invoke the law; they ask the application of all its rigid rules; they invite the closest scrutiny. They have demanded thus much at the hands of their captor. He has refused it; and now they demand the same at the hands of Congress. The writ of *habeas corpus* was invented to meet the exigencies of exactly such a case. It commands the person who holds the custody of another to bring him before the judge, in order that the cause of his detention may be inquired into—that he may be remanded to custody, if he be legally held; that he may be discharged if he is detained without authority of law. The right to invoke its aid is secured to every criminal in the land, and has never been invaded by the constituted authorities until now. These memorialists would have availed themselves

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of it to ascertain the accusation against them, and to force a "speedy trial;" but the President has declared that he has authorized the military officer to suspend their right to the writ, and to hold them prisoners at his pleasure.

It is fortunate for these memorialists, in the assertion of their personal rights—fortunate for the cause of the true interpretation of the Constitution—that there is no charge, no intimation, that they have been guilty of any offense known to the laws of the land; for, notwithstanding the experience of eighty years, we are prone to forget that the integrity of the Constitution, the solution of the problem of the compatibility of social order with individual security, demand that the constitutional guarantees of personal liberty should be as faithfully kept, as rigidly enforced, as perfectly administered, in the case of the meanest criminal as of the purest patriot.

The President of the United States, in his message at the commencement of the extra session, announces his action and his reason for it in the following language:

"Soon after the first call for militia, it was considered a duty to authorize the commanding general in proper cases, according to his discretion, to suspend the privilege of the writ of *habeas corpus*, or, in other words, to arrest and detain, without resort to the ordinary processes and forms of law, such individuals as he might deem dangerous to the public safety. This authority has been purposely exercised but very sparingly. Nevertheless, the legality and propriety of what has been done under it are questioned, and the attention of the country has been called to the proposition, that one who is sworn 'to take care that the laws be faithfully executed' should not himself violate them. Of course some consideration was given to the question of power and propriety, before this matter was acted upon. The whole of the laws which were required to be faithfully executed, were being resisted and failing of execution in nearly one third of the States. Must they be allowed to finally fail of execution, even had it been perfectly clear that by the use of means necessary to their execution, some single law, made in such extreme tenderness of the citizen's liberty, that practically it relieves more of the guilty than of the innocent, should, to a very limited extent, be violated? To state the question more directly, are all the laws but one to go unexecuted, and the Government itself go to pieces lest that one be violated? Even in such a case, would not the official oath be broken if the Government should be overthrown, when it was believed that disregarding the single law would tend to preserve it? But it was not believed that this question was presented. It was not believed that any law was violated.

"The provision of the Constitution, that the privilege of the writ of *habeas corpus* shall not be suspended unless when, in cases of rebellion or invasion, the public safety may require it, is equivalent to a provision—is a provision—that such privilege may be suspended when, in cases of rebellion or invasion, the public safety does require it. It was decided that we have a case of rebellion, and that the public safety does require the qualified suspension of the privilege of the writ, which was authorized to be made. Now it is insisted that Congress, and not the Executive, is vested with that power. But the Constitution itself is silent as to which or who is to exercise the power; and as the provision was plainly made for a dangerous emergency, it cannot be believed the framers of the instrument intended that in every case the danger should run its course until Congress could be called together; the very assembling of which might be prevented, as was intended in this case, by the rebellion."

In response to a call from this House, on the 12th day of July, 1861, the President sent copies of three different orders, giving authority to suspend the writ of *habeas corpus*. One is in form a proclamation, and relates to the suspension within the islands of Key West, the Tortugas, and Santa Rosa.

Two others, dated, respectively, April 27, 1861, and July 2, 1861, are simply "orders," addressed

"to the Commanding General of the Army of the United States," in these words:

"If at any point on or in the vicinity of any military line, which is now or which shall be used, between the city of New York and the city of Washington, you find resistance, which renders it necessary to suspend the writ of *habeas corpus* for the public safety, you personally, or through the officer in command at the point where resistance occurs, are authorized to suspend that writ."

They seem to have been secret orders, and never to have been made public before.

It is a popular error that the necessary effect of a hearing on a writ of *habeas corpus* is to interfere with a legal imprisonment. It is not so. The only effect is to ascertain whether the imprisonment is legal; to ascertain whether it is by competent authority on a charge of crime. If it is, the prisoner is returned to the custody of the officer who held him; if it is not, he is discharged. This law, we are told by the President, was made in too "extreme tenderness of the citizen's liberty," and was therefore suspended. The effect of the suspension is to prevent that inquiry into the legality of the imprisonment. The object of the suspension is to enable those who happen to have power, to imprison the citizen who has been guilty of no offense, and to subject him to just such rigor of confinement as their discretion, not the law of the land, may prescribe.

The President claims distinctly the authority to arrest and detain, without resort to the ordinary forms and processes of law, all persons, not in the land and naval forces, not prisoners of war, nor engaged in military enterprises, whom he or his commanding general might "deem dangerous to the public safety;" and he claims this authority, first, under the Constitution, and, secondly, notwithstanding the Constitution, "when it is believed that disregarding the single law would tend to preserve" the Government.

First. UNDER THE CONSTITUTION.—The President admits the authority is not expressly granted him by the Constitution; and, if granted him at all, it is only by inference, and this derived chiefly from the supposed inconvenience of lodging the authority in Congress.

The only clause in the Constitution relating to this subject is found in the second clause of the ninth section of the first article. It is in these words:

"The privilege of the writ of *habeas corpus* shall not be suspended, unless, when in cases of rebellion or invasion, the public safety may require it."

This certainly is a provision, as the President well maintains, that, in cases of rebellion or invasion, when the public safety shall require it, the privilege of the writ may be suspended. Who shall exercise this power of suspension?

The context of the Constitution, the history of English jurisprudence, the uniform construction of the provision, from the hour of its adoption until the order of President Lincoln to his military officers on the 27th day of April, 1861, decisively, authoritatively answer this question.

1. The first article of the Constitution exclusively relates to the organization, the powers, and duties of Congress. There is but one single exception to this statement, and that is found in the first clause of the tenth section, where a limitation is imposed upon the powers of the States. The first, second, and third sections relate to the organization of the two Houses; the fourth sec-

tion relates to "the times, places, and manner of holding elections for Senators and Representatives;" the fifth and sixth sections confer certain powers on the separate Houses, and grant privileges and impose disabilities upon the members; the seventh section defines the various steps in the passage of a bill; the eighth section declares the powers of Congress; the ninth section declares the powers which Congress shall not have; the tenth section, with the single exception alluded to, restricts the powers of the States, "without the consent of Congress."

The eighth section commences with the words "Congress shall have power to," and defines through eighteen clauses the several grants.

The ninth section, throughout eight clauses, limits the powers already granted, or declares absolute unqualified restriction upon new subjects, and might well have commenced with the words "Congress shall have no power to," without affecting the sense, or impairing the vigor in any degree.

Congress shall have no power—

1. To prohibit the migration or importation, &c.
2. To suspend the privilege of the writ of *habeas corpus*, unless when in cases, &c.
3. To pass a bill of attainder.
4. To lay a capitation or other direct tax unless in proportion, &c.
5. To lay a tax or duty on articles exported, &c.
6. To give any preference by any regulation of commerce, &c.
7. To permit money to be drawn from the public Treasury, except in consequence of appropriations.
8. To grant titles of nobility, &c.

And yet it is proposed now to wrest this second clause from the context, and to contend that the limitation applies, not to Congress, but to the President, whose name and office and duties are in but one other place in the article even alluded to.

The argument to sustain this proposition is obviously fallacious. It assumes the very point to be demonstrated. The argument is this: the prohibition to a department of the Government to exercise a particular power in all cases except two, is equivalent to a grant of the power to that department in those two cases; if we ascertain the excepted cases, we know *when* the power may be exercised; if we ascertain the department to which the prohibition applies, we know *who* may exercise the power. The Constitution prohibits the suspension of the privilege of *habeas corpus* except in the two cases of rebellion and invasion. In those two cases the power of the suspension may be exercised—by whom? Obviously by the department to which the prohibition applies. If we ascertain that, we know where the power of suspension resides. The context shows that the prohibition applies to the Congress; and therefore the power resides in that body. The President says no; it would be very inconvenient that it should reside in Congress; it would be far more convenient that it should reside in the President, who may exercise it at any moment, and over any district of country. It is fair to presume that the framers of the Constitution intended to lodge the power where it could be most conveniently and beneficially exercised—that is, with the President; therefore, as the grant and prohibition apply to the same department, and as we assume

the grant was intended to be to the President, the prohibition must apply to him.

But I deny the assumption that the power ought to be lodged with the President. I say it would be unwise, dangerous, and in discord with our whole system. That the power has been given to the President, notwithstanding the many cogent reasons to the contrary, is the very point to be maintained; and this point the above argument assumes.

The prohibition of the Constitution applies either exclusively to Congress, or exclusively to the Executive, or generally to all the departments of the Government.

If it applies exclusively to Congress, then the power to suspend resides exclusively in that body. If it applies exclusively to the Executive, then the power to suspend resides exclusively in him, and Congress cannot, in any case, pass any law on the subject. If it applies generally to all the departments, then, by a parity of reasoning, all the departments have the power to suspend that privilege. The judge may refuse the writ on his own motion, before as well as after the order of the President, or the passage of a law by Congress; indeed, after the President has refused to order the suspension, or Congress has refused to pass a law authorizing it; and thus the liberty of the citizen is subject to the different, it may be discordant, rules adopted by each department of the Government, on its idea of what the public safety may require in cases of rebellion or invasion. The context of the Constitution affords a simple, uniform, beneficent rule; departure from it involves us in confusion, contradiction, and uncertainty.

2. But if the context of the Constitution left any doubt on this subject, the history of the writ of *habeas corpus*, and its acknowledged condition at the time of the adoption of the Constitution, throw a flood of light on it.

From the earliest period of the common law the personal liberty of the subject was declared secure from arbitrary and illegal infraction. The barons, in their contest with King John, while they asserted the rights of their order, failed not to enlist the sympathies of the commons, by a formal declaration of their ancient and acknowledged privileges. Magna Charta declares

"No freeman shall be taken, imprisoned, or dispossessed of his free tenement and liberties, or outlawed or banished, or anywise hurt or injured, unless by the legal judgment of his peers, or by the law of the land."

This was the law. It was made effective by the writ of *habeas corpus*, whose office was to bring before the civil magistrate the person of every prisoner, that the cause, the circumstances, and the authority of his imprisonment might be inquired into, and that he might be remanded, discharged, or admitted to bail, as "the law of the land" required. For nearly three centuries the history of England is but the story of weak and wicked kings, of civil wars and internal discord in the thread of which we find the theory of the Great Charter of the people's rights forever maintained, and its practical application continually denied. The comparative repose of the nation during the next century left men free to observe these violations of their rights. They saw with indignation the tyranny of Elizabeth; they chafed under the yoke of her arbitrary successor; and

the third year of the first Charles they compelled him, as the price of his throne, to assent to the Petition of Right—

“Whereby he bound himself never again to imprison any person except in due course of law, and never again to subject his people to the jurisdiction of courts-martial.”—*Macaulay's History of England*, vol. I, p. 79.

“Forced loans, benevolences, taxes without consent of Parliament, *arbitrary imprisonments*, the billeting of soldiers, *martial law*; these were the grievances complained of, and against these an eternal remedy was to be provided. The Commons pretended not, as they affirmed, to any unusual powers or privileges; they aimed only at securing those which had been transmitted to them from their ancestors; and their law they resolved to call a Petition of Right, as implying that it contained a corroboration or explanation of the ancient constitution, not any infringement of royal prerogative, or acquisition of new liberties.”—*Hume's History of England*, cap. 51.

Charles would not maintain his faith; would not observe this “explanation of the ancient constitution,” and after ten years of struggle and of war, lost both his crown and his life as the penalty of its infraction. His son, taught something by twelve years of exile, attacked by more secret and subtle processes this ancient constitutional right, till every scheme and device by which he sought to compass the right of arbitrary imprisonment were swept away by the great *habeas corpus* act of 31 Charles II.

“James II sought to obtain a repeal of the *habeas corpus* act, which he hated, as it was natural a tyrant should hate the most stringent curb that ever legislation imposed on tyranny.”—*Macaulay's History of England*, p. 3.

And failing this, he claimed the power to dispense with the operation of all the laws. James lost his throne; and one of the articles in the Declaration of Right, whereby the succession was assured to William and Mary, solemnly affirmed that—

“The dispensing power lately assumed and exercised had no legal existence.”—*Macaulay's History of England*, p. 606.

From that day to this, from that “Declaration,” just one hundred years before the formation of our own Constitution, in all her foreign wars, in all her intestine troubles, under the pressure of whatsoever exigency, no English monarch—weak, wayward, and wicked as some of them have been—has ventured to suspend the *habeas corpus* act, or to assert the power to hold in prison a citizen at his own discretion, and by military power.

In his *History of the English Constitution*, Hal- am says:

“It cannot be too frequently repeated, that no power of *arbitrary detention* has ever been known to our constitution since the charter obtained at Runnymede. The writ of *habeas corpus* has always been a matter of right.”—Chap. 5.

“From the earliest records of the English law, no free- man could be detained in prison, except upon a criminal charge, or conviction, or for a civil debt. In the former case, it was always in his power to demand of the court of King's bench a writ of *habeas corpus ad subjiciendum*, directed to the person detaining him in custody, by which he was enjoined to bring up the body of the prisoner with the warrant of commitment, that the court might judge of its sufficiency, and remand the party or admit him to bail, or discharge him, according to the nature of the charge.”—Chap. 8.

The revolution of 1688, in England, effected rather a change of rulers than of constitution—rather enforced obedience to the well-established law of the realm, than adopted a new and more liberal law. Macaulay, in his observations upon the character of that event, says:

“Without the consent of the representatives of the nation, no statute could be enacted, no tax imposed, no regular soldiery kept up; that no man could be imprisoned even for a day by the arbitrary will of the sovereign; that

no tool of power could plead the royal command as a justification for violating any legal right of the humblest subject, were held by both whigs and tories to be the fundamental laws of the realm. A realm of which these were the fundamental laws, stood in no need of a new constitution.”—*History of England*, vol. II, p. 611.

De Lolme, speaking of the suspension of the *habeas corpus* act during the next succeeding years, when the Pretender was asserting his rights to the throne, says:

“But the executive power did not thus, of itself, stretch its own authority; the precaution was deliberated upon, and taken by the representatives of the people, and the detaining of individuals, in consequence of the suspension of the act, was limited to a certain fixed time.”—*Essay on the Constitution of England*, Book II, ch. 18, part second, (note.)

In 1763, Chief Justice Pratt, in overruling a motion for a new trial, made by the defendant in an action of trespass for arresting the plaintiff, on a warrant from Lord Halifax, the Secretary of State, said:

“If the jury had been confined, by their oath, to consider the mere personal injury only, perhaps twenty pounds damages would have been thought damages sufficient; but the small injury done to the plaintiff [a journeyman printer] and the inconsiderableness of his station and rank in life, did not appear to the jury in that striking light in which the great point of law touching the liberty of the subject appeared to them at the trial. They saw a magistrate over all the king's subjects exercising arbitrary power, violating magna charta, and attempting to destroy the liberty of the kingdom by insisting upon the legality of this general warrant before them; they heard the king's counsel, and saw the solicitor of the treasury endeavoring to support and maintain the legality of the warrant in a tyrannical and severe manner: these are the ideas which struck the jury on the trial; and I think they have done right in giving exemplary damages. To enter a man's house by virtue of a nameless warrant, in order to procure evidence, is worse than the Spanish Inquisition—a law under which no Englishman would wish to live an hour. It was a most daring public attack made upon the liberty of the subject.”—*Huckle vs. Money*, 2 Wilson, 205.

Sir William Blackstone, in his *Commentaries on the Laws of England*, written in the year 1765, twenty-two years before the adoption of the Constitution of the United States, says:

“But the happiness of our constitution is that it is not left to the executive power to determine when the danger of the state is so great as to render this measure expedient. It is the Parliament only, or legislative power, that whenever it sees proper can authorize the Crown, by suspending the *habeas corpus* for a short and limited time, to imprison suspected persons without giving any reason for so doing.”

To this point had the law of England been brought by the struggles of nearly five centuries. Magna charta had affirmed the principle which lay deep in the hearts of Englishmen, and to it they had adhered with unwavering fidelity. Every act of revolution, every outburst of popular passion, every restriction put upon prerogative, arose from their efforts to compel its observance by the sovereign. They succeeded in 1688; and the swelling tones from the dome of St. Paul's, which announced the election of William and Mary, announced also that arbitrary imprisonment had forever ceased in the land. The unbroken practice of a century was thenceforth ingrafted on the principle so deeply grounded in the English system; so that in 1787—the year of the formation of our Constitution—no proposition was more incontrovertible than that “Parliament only can authorize the Crown to suspend the *habeas corpus*.”

The American Revolution was a protest against prerogative; it was not an assault upon the constitution; it did not arise from dissatisfaction with its principles; it was resistance to its violations—

sometimes by Parliament, much more often by the king. That Revolution had been successful, and its leaders, civil and military, were come together to form a new Government. Can it be believed that they, protestants against kingly prerogative—revolutionists because of outrages on personal rights by their sovereign—just emerged from a seven years' war in defense of those rights and of indignant defiance of the royal tyranny—would clothe the executive of their new Government with a power over the citizen which even their former master had never dared to pretend that he possessed? Can it be believed that they, proud of their English lineage, proud of their English liberty—aye, proud of their loyalty to the principles of the English constitution, and fortifying themselves at every step of the Revolution by appeals to English example and English law—would sacrifice that right which their English ancestors accounted their chiefest glory? Those ancestors had, for six centuries, battled bravely for popular rights. They had placed the crown upon the brow of the people; they had decked it with many a jewel; it was radiant with the glories of popular liberty; and can it be believed that our fathers would tear away this priceless gem, which sparkled in the very forefront of that coronet, and with it adorn the scepter of executive power? In no other point in the Constitution did they limit the rights of the people as admitted at that day; can it be believed that they would, in this one vital point alone, restrict the bounds of liberty and enlarge those of power?

They speak of the *habeas corpus* as a thing existing, a privilege, whose character and extent are so ingrafted upon the structure of their society and Government—a right so familiar to the minds of men; so interwoven with every theory of popular rights and executive power; so thoroughly understood; so accurately defined that it needs neither to be established nor described—a right so dearly prized that they will guard it more carefully than ever it has been guarded before; that they will establish as the very corner-stone of the new Republic, that whereas heretofore it might be suspended at the will of the Legislature, it shall hereafter be suspended by the same power only “when in cases of rebellion or invasion the public safety may require it.”

3. The uniform construction of this clause of the Constitution by every department of the Government, is, that the power of suspension resides in Congress alone.

In 1807, when Mr. Jefferson submitted to Congress certain documents relating to the alleged conspiracy for a dismemberment of the Union, the Senate took the alarm, and, with entire unanimity, passed a bill suspending the privilege for three months; it was defeated in the House of Representatives—rejected on its first reading by an overwhelming majority.

In the same year, in discussing the question arising on an application by Bollman & Swartwout, for a writ of *habeas corpus*, to inquire into the circumstances of their confinement after commitment by the district court, to which they had been surrendered by Mr. Jefferson, Chief Justice Marshall says:

“If at any time the public safety should require the suspension of the powers granted by this act in the courts of the United States, it would be for the Legislature to say so.”

I pause to notice a curious criticism upon this passage by the Attorney General in his labored argument in favor of the power of the President. He says:

“The court does not speak of suspending the privilege of the writ, but of suspending the powers vested in the courts by the act.” * * * * * “If, by the phrase suspension of the privilege of the writ of *habeas corpus* we must understand a repeal of all the power to issue the writ, then I freely admit that none but Congress can do it.”

The Attorney General thinks that the powers of a court are more carefully guarded than the personal liberty of the citizen; that the first can be suspended only by the joint action of the whole legislative body; but that the latter is committed to the discretion of the President alone. He thinks that a suspension of the privilege of the writ does not interfere with the powers vested in the courts. What are those powers? To compel the production of the body of the prisoner by his custodian that he may be remanded, discharged, or bailed, and, for this purpose, to use the powers of the marshal and his posse. If the President directs his subordinate to refuse to produce the body of the prisoner, to defy the authority of the marshal, to use the Army of the United States to resist his posse, does he not interfere with the power vested in the courts?

The privilege of the writ involves the right of the party to invoke and to profit by it, and the power and duty of the court to issue and hear and adjudge and to enforce its judgment. The suspension of “the privilege” suspends the right to invoke the authority to issue and to hear—the power to enforce it; and if this be so, the Attorney General admits that the suspension can only be effected by act of Congress.

But to return to the construction of this clause of the Constitution. Mr. Justice Story, in his Commentaries, section 1336, says:

“It would seem, as the power is given to Congress to suspend the writ of *habeas corpus* in cases of rebellion or invasion, that the right to judge whether that exigency had arisen, must exclusively belong to that body.”

Judge Kent was sitting on the bench of the supreme court of New York, in 1813, when the naval and military officers of the United States evaded the execution of the writ commanding the production of the body of Stacey. He ordered an attachment to be issued, saying:

“Nor can we hesitate in promptly enforcing a due return to the writ when we recollect that in this country the law knows no superior; and that in England their courts have taught us, by a series of instructive examples, to exact the strictest obedience, to whatever extent the persons to whom the writ is directed may be clothed with power or exalted in rank.” * * * * * “If ever a case called for the most prompt interposition of the court, to enforce obedience to its process, this is one. A military commander is here assuming criminal jurisdiction over a private citizen; is holding him in the closest confinement, and contemning the civil authority of the State.”—*In re Stacey*, 10 Johnson, 328.

The opinions in *Johnson vs. Duncan* (3 Martin, La. Rep., 531) constitute a noble vindication of the powers and dignity of the law, as against the attacks of the military authorities. They were delivered in March, 1815, when Jackson was at the height of his popularity and power; when the successful defense of New Orleans had shown the efficiency of the measures which he had adopted.

Martin, Judge, said:

“At the close of the argument on Monday last we thought it our duty, lest the smallest delay should countenance the idea that this court entertain any doubt on the first ground,

to instantly declare, *viva voce*, (although the practice is to deliver our opinions in writing,) that the exercise of an authority vested by law in this court, could not be suspended by any man."

Derbigny, Judge, said:

"The monarch, who unites in his hands all the powers, may delegate to his generals an authority as unbounded as his own; but in a Republic, where the Constitution has fixed the extent and limits of every branch of Government, in time of war as well as of peace, there can exist nothing vague, uncertain, or arbitrary in the exercise of any authority. The Constitution of the United States, in which everything necessary to the general and individual security has been foreseen, does not provide that in times of public danger the executive power shall reign to the exclusion of all others. It does not trust into the hands of a dictator the reins of Government. The framers of that charter were too well aware of the hazards to which they would have exposed the fate of the Republic by such a provision; and had they done it, the States would have rejected a Constitution stained with a clause so threatening to their liberties. In the mean time, conscious of the necessity of removing all impediments to the exercise of the executive power in cases of invasion or rebellion, they have permitted Congress to suspend the privilege of the writ of *habeas corpus* in those circumstances, if the public safety should require it. Thus far and no further goes the Constitution."

And after an examination of the powers of the British Government, he exclaims:

"And can it be asserted that, whilst British subjects are thus secured against oppression in the worst of times, American citizens are left at the mercy of the will of an individual, who may, in certain cases—the necessity of which is to be judged of by himself—assume a supreme, overbearing, unbounded power? The idea is not only repugnant to the principles of any free Government, but subversive of the very foundations of our own."

And to the testimony of judges and jurists, may be added that of writers on military law:

"The Constitution guaranties the privilege of the writ of *habeas corpus*, which it declares shall not be suspended 'unless when, in cases of rebellion or invasion the public safety may require it;' and the intervention of Congress is necessary before such suspension can be made lawful."—*De Hart on Military Law*.

The gentleman to my right says that Washington and Jefferson both suspended the writ. He is entirely mistaken. General Washington, in his instructions to the officers and troops who were to take part in suppressing the whisky insurrection, says:

"That every officer and soldier will constantly bear in mind that he comes to support the laws, and that it would be peculiarly unbecoming in him to be, in any way, the infractor of them; that the essential principles of free government confine the province of the military, when called forth on such occasions, to two objects: first, to combat and subdue all who may be found in arms in opposition to the national will and authority; secondly, to aid and support the civil magistrates in bringing offenders to justice. The dispensation of this justice belongs to the civil magistrates; and let it ever be our pride and our glory to leave the sacred deposit there inviolate."—*Irving's Life of Washington*, vol. 5, ch. 25.

Mr. Jefferson, in 1787, objected to the Constitution that it omitted to provide "for the eternal and unremitting force of the *habeas corpus* laws." In 1788 he advised that four States should refuse to ratify the Constitution until a declaration of rights had been annexed to it, asserting, among other things, that there should be "no suspension of the *habeas corpus*;" and in 1807, at the period of Burr's conspiracy—to which I have before alluded—he neither assumed to exercise the power himself, nor did he ask or advise Congress to do so. On the contrary, in his message to Congress, he said:

"It will be seen that of three of the principal emissaries of Mr. Burr, whom the general had caused to be apprehended, one had been liberated by *habeas corpus*, and the two others, being those particularly employed in the en-

deavor to corrupt the general and Army of the United States, have been embarked by him for our ports in the Atlantic States; probably on the consideration that an impartial trial could not be expected during the present agitations of New Orleans, and that that city was not, as yet, a safe place of confinement. As soon as these persons shall arrive, they will be delivered to the custody of the law, and left to such course of trial, both as to place and process, as its functionaries may direct."

And when the Senate bill, suspending the *habeas corpus* for three months, came to the House, Mr. Eppes, Jefferson's son-in-law, moved its rejection; and his friends and supporters—all, I believe, except two—voted for the motion. The motion prevailed, only nineteen votes being in the negative.

These are the instructions which the context of the Constitution, its uniform interpretation, and the history of English liberty afford. They answer the question, who shall suspend the privilege of *habeas corpus*? And yet, with this answer full before him, the President says:

"The Constitution itself is silent as to which, or who, is to exercise the power; and as the provision was plainly made for a dangerous emergency, it cannot be believed the framers of the instrument intended that, in every case, the danger should run its course until Congress could be called together."

It is taught us by every page of the world's history that the possession of power has blinded the eyes of man, and destroyed his judgment.

Secondly. NOTWITHSTANDING THE CONSTITUTION. The President has little confidence in this claim of power under the Constitution, for he prefaces the statement of the claim with argument to show that it was his right and his duty to suspend the privilege of *habeas corpus*, even though such suspension were prohibited to him by the Constitution. The President says:

"The whole of the laws which were required to be faithfully executed were being resisted and failing of execution in nearly one third of the States. Must they be allowed finally to fail of execution, even had it been perfectly clear that by the use of the means necessary to their execution, some single law, made in such extreme tenderness of the citizen's liberty, that practically it relieves more of the guilty than the innocent, should to a very limited extent be violated? To state the question more directly, are all the laws but one to go unexecuted, and the Government itself go to pieces, lest that one be violated? Even in such a case would not the official oath be broken, if the Government should be overthrown, when it was believed that disregarding the single law would tend to preserve it?"

Attorney General Bates, in the argument already referred to, says of the President:

"The end—the suppression of the insurrection—is required of him. The means and instruments to suppress it are lawfully in his hands; but the manner in which he shall use them is not prescribed, and could not be prescribed without a foreknowledge of all the future changes and contingencies of the insurrection. He is, therefore, necessarily thrown upon his discretion as to the manner in which he will use his means to meet the varying exigencies as they arise."

The Secretary of State, in his official dispatch to Lord Lyons, dated October 14, 1861, after announcing the absolute right on the part of the President to suspend the writ of *habeas corpus*, "whenever and wherever, and in whatsoever extent the public safety, endangered by treason or invasion in arms, in his judgment requires," says:

"The safety of the whole people has become, in the present emergency, the supreme law; and so long as the danger shall exist, all classes of society, equally the denizen and the citizen, cheerfully acquiesce in the measures which that law prescribes."

And partisan friends, approving the act of the

President, and seeking to justify it by argument, say "that in times of war and civil strife the Constitution is suspended; when danger threatens the Government, it must be protected by all necessary means; that treason must be crushed out at whatever cost or by whatever measures."

These are only different statements of the same proposition. They all involve the idea that whenever in times of civil commotion the President may think the Government is in jeopardy, his discretion, not the Constitution, is the measure of his power in defending it.

If the President may suspend the privilege of *habeas corpus* because he deems such suspension necessary, so also may he, under like circumstances, suspend the right to a "speedy trial," or to exemption from "excessive bail," or the right to a "trial by jury," or that it shall be within the proper district, or the provision that no man shall be deprived of "his life without due process of law." If the President may, at his will, imprison a man without law, because he believes such imprisonment necessary to the public safety, may he not, without law, under a like pressure, put him to death? If he may suspend one of these constitutional provisions, he may suspend two, he may suspend all.

If, under the plea of necessity, the President may suspend those clauses of the Constitution which assure to the citizen his personal rights, so also may he suspend those clauses which expressly limit his own power; he may prolong, indefinitely, his own term of office, on the pretense that the imperiled condition of the country forbids the excitement of an election or a change of executive officers, or that he should submit to impeachment. He may suspend the provision that "for any speech made in either House members shall not be questioned in any other place;" or that Representatives shall be elected every two years; or that all legislative powers shall be vested in Congress. If he may suspend any clause of the Constitution, or any right secured by it, *à fortiori* may he suspend the laws of Congress, and the rights and remedies prescribed, the powers granted, or the duties enjoined by them.

And thus, according to this new theory, the President may supersede entirely the Constitution and the laws; set aside every guarantee of liberty; disregard every limitation upon his own power; abolish all the civil institutions of the land, and substitute for them his own undisputed will; he may displace the government, which he has sworn to preserve, and which we have been accustomed to believe, and to boast, is the best ever framed, and inaugurate in its room the earliest and worst form of government—the despotic command of a military chief; he may, with a word, abrogate the entire system which we have built upon the foundations laid by our fathers, and with another word build up a new and a different system; and all this rightfully, legitimately, without usurpation.

The position is utterly untenable. It has no warrant in the Constitution, nor in the principles which underlie our system of government, nor in the genius of our people, nor in the spirit of liberty. It is inconsistent with them all. Its deliberate adoption by the people would destroy them all. It is the offspring of cowardice, and would become the fruitful parent of tyranny and dis-

order. It would reduce any nation to the position of slaves; indeed, any nation, willing to adopt it as a theory of government, is so lost to every manly aspiration for freedom; so lost to a true appreciation of its dignity and rights; so wanting in courage and constancy to maintain them, that it is slavish already; so weak and degraded that the yoke is but the outward token and fitting emblem of its true condition. We are told in defense of this new theory, that the power is never to be exercised, indeed does not exist, except when the rebellion is threatening the very existence of the Government. I reply in the language of the President, in his argument upon the question of secession:

"The little disguise that the supposed right is to be exercised only for just cause, themselves to be the sole judge of its justice, is too thin to merit any notice."—*Message to Congress, July 4, 1861.*

We are told that the Constitution was not intended for times of civil war. Doubtless our fathers hoped that calamity would never befall our land; but they knew human nature too well to expect, forever, profound repose. They themselves had just emerged from a civil war marked by more than the usual trials of a revolutionary government; they had contended with the enemy from abroad, and with the tories in their own midst, and with the remembrance fresh upon them, they framed this Constitution and Government. It is an impeachment of their honesty or their good sense to say that their work was designed to be operative during the quiet days of prosperous peace, and to be superseded whenever strife and commotion should afford both opportunity and temptation to a usurper. They intended that the Constitution should prevail at all times, in war as well as in peace. They intended by it to define the bounds of power, and forever to restrain it within those bounds. It has done so. It has vested the Government, in some of its departments, with all the power which it was intended ever should be used. Some power was not to be used; for our fathers thought—their sons should never forget it—that the liberties of the people, the rights of the citizen, were to be preferred to any form of government, even their own handiwork; that when they came into collision the Government must go down; that it would be better to risk the destruction of the Government, than to imperil those interests, whose security is the only object for which all good governments are created.

If the laws are too mild, let them be made more stringent; if crimes have not been defined, let them be denounced, and punishment assigned them; if officers are corrupt, let them be removed; if judges are imbecile or dishonest, let them be impeached; let the machinery of the Government all be used, and power enough will be found. Whoever would go beyond this, would subvert the Government under pretense of upholding it; would destroy the Constitution under pretense of preserving it. The Constitution is the warrant of the Government, gives it power and substance, breathes into it the very breath of life. The Government has no power, no being, except that given it by the Constitution. The President holds his office, the Congress exercises its functions, the courts sit and give judgment by virtue of its provisions alone. If the Constitution is suspended, the Government falls. These officers have not—no, not for an in-

stant—more power than the humblest and every citizen. To suspend the Constitution in order to preserve the Government, would be to stop the current of blood in the veins in order to improve the health; to take out the heart in order to preserve the life. To preserve the Government the Constitution must be preserved; its principles must be cherished; its limitations must be respected; its prohibitions must be obeyed. When these are powerless for its preservation, our fathers intended that it should fall; for they ordained and established the Constitution “to secure the blessings of liberty to themselves and their posterity,” and invented the Government only as a machine to administer it. If it shall ever fail to do this, and if its existence shall ever become incompatible with the existence of the Constitution, it will have failed in its office, and ought to give place to a more efficient organization.

Every instinct of patriotism, every hope of safety, every aspiration for national life, (which is with us but the emblem of national liberty,) should prompt, nay, should command, in thunder tones, this people to rebuke every attempt at usurpation. “Let there be no change by usurpation,” said Washington, in his farewell address; “for though this, in one instance, may be the instrument of good, it is the customary weapon by which free governments are destroyed.”

It is attempted now, in times of great excitement, in a moment of great public calamity. If it is permitted now, it will be repeated; precedent will give authority; the tone of the public mind will be gradually degraded; its sensibility to infractions of public liberty will be deadened. The people will yield again and still again, till the public sentiment debauched, the public virtue destroyed, the national character tarnished, the national love of liberty diminished, they will become an easy prey to the tyrant. Each successful aggression upon a people's rights, degrades its appreciation of their value, and with the loss of it, the nation loses both the desire and the power to maintain them.

These are not vain fears. Already they begin to be realized. When, six months ago, the writ of *habeas corpus* was suspended in the case of John Merriman, who was held on a charge of treason, till the grand jury could take action, the liveliest interest was felt throughout the country. Now, if public rumor is not greatly at fault, citizens have been committed to prison whose only fault is, that they have spoken on the hustings or published in a newspaper criticisms on his policy distasteful to the President or his Cabinet; newspapers have been suppressed; their transmission through the mails refused; their circulation by express companies prevented; freedom of speech and of the press has been abridged; and in the department of Ohio a second arrest by the military has been made after the prisoner had been held to bail to answer the charge; and these things scarcely command a passing notice from the mass of the people.

It is vain to say that when the public danger shall have passed away these usurpations will cease, the Constitution will be restored to its vigor, and the people resume in peace their accustomed liberties. When was it ever so? When was power ever shorn of its acquisitions, save by the sword? When were liberties, once surrendered, ever re-

conquered except in blood? For the great crime against its own liberties, no nation has ever made expiation but in the agonies of revolution; without the shedding of blood there is no remission of this sin. You cannot make a nation jealous of its rights by teaching it that, in times of great public danger, the citizen has no rights. You cannot increase its manhood or its constancy, or make it sensitive to dishonor, by teaching that in times of danger it must rely not on its own virtue and courage, but on the power and good will of its rulers.

No free people should ever listen to this argument of State necessity. Its history is marked by the wreck of popular liberty and free institutions, by the sad tokens of human hopes destroyed, and noble aspirations blighted. As we look back upon its pathway of desolation, and trace it even to our own times and country, we may easily imagine that the very spirit of American liberty this day hovers over us and tearfully prays that it may not be added to the list of victims. This argument is always used by the possessors of power; it is a voice which issues always from the throne, and if not instantly silenced, it is answered, ere long, in the wail of the nation, as it surrenders its liberties in submission to arbitrary power. We have seen its effect in our day. An imperial throne built upon the ruins of a republic and a presidency; built upon the ruins of oaths broken, rights violated, liberties despised, and a nation oppressed, is but the familiar story with which we close one page of the history of “State necessity.”

We are told that in times of great public danger the people should strengthen the hands of their rulers by confidence in the integrity of their motives, and in the wisdom of their measures. Yes, truly! Strengthen them with the *confidence* of the people so long as they confine themselves to the powers granted by the Constitution, but paralyze them with *distrust* when they begin the work of usurpation. Demosthenes, in his “divine philippic,” told the Athenians that “the strongest fortress of a free people against a tyrant is distrust.” They heeded not his warning, and thenceforth Grecian independence and Grecian liberties were but a name. William the Silent taught the same lesson to the northern Netherlands when Philip sought their confidence. They heeded its wisdom, and glories clustered for two hundred years around the Dutch republic.

I do not speak to-day in behalf of these memorialists alone—honorable, upright as I believe them to be—deprived of their constitutional rights as I think they certainly are. I speak in behalf of the Constitution, in behalf of the liberties of the nation, of the rights of my constituents, of the rights of every citizen in the land; and in behalf of them all, I now say that this claim of the executive department of the right to suspend the privilege of the *habeas corpus*, to seize and detain the citizen without regard to the provisions and processes of law, is utterly untenable; and that it becomes this House—every member of it; the chosen Representatives of the people—as well in virtue of the oath we have taken to support the Constitution as of the position which we hold in the framework of the Government, solemnly—aye, solemnly—before God and our countrymen, to protest against it.

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